Before the Federal Communications Commission Washington, D.C. 20554

In the Matter of)	
)	
Digital Output Protection Technology)	MB Docket Nos. 04-55, 04-56,
and Recording Method Certifications)	04-57, 04-58, 04-59, 04-60, 04-61,
)	04-62, 04-63, 04-64, 04-65, 04-66,
All Technologies and Recording Methods	j	04-68

OMNIBUS REPLY OF THE MOTION PICTURE ASSOCIATION OF AMERICA, INC., METRO-GOLDWYN-MAYER STUDIOS INC., PARAMOUNT PICTURES CORPORATION, SONY PICTURES ENTERTAINMENT INC., TWENTIETH CENTURY FOX FILM CORPORATION, UNIVERSAL CITY STUDIOS LLLP, THE WALT DISNEY COMPANY, AND WARNER BROS. ENTERTAINMENT INC.

Jon A. Baumgarten Bruce E. Boyden Proskauer Rose LLP 1233 Twentieth Street NW, Suite 800 Washington, DC 20036 (202) 416-6800

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The Motion Picture Association of America, Inc. ("MPAA"), Metro-Goldwyn-Mayer Studios Inc., Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLLP, The Walt Disney Company, and Warner Bros. Entertainment Inc. (collectively, "the MPAA Parties") hereby submit this reply to oppositions and comments filed by the Center for Democracy & Technology, Philips Electronics North America Corp., Public Knowledge & Consumers Union, SmartRight, and Tivo Inc. to their petition for partial reconsideration and clarification of the Commission's August 4, 2004 Order in the above-captioned dockets.²

INTRODUCTION AND SUMMARY

In their Petition, the MPAA Parties requested that the Commission reconsider its authorization of TiVoGuard and clarify that both TiVoGuard and SmartRight must use proximity

¹ Petition for Partial Reconsideration and Clarification of the Motion Picture Association of America, Inc., *et al.*, MB Docket Nos. 04-55, *et al.* (filed Sept. 13, 2004) ("MPAA Parties' Petition").

² Order, *Digital Output Protection Technology and Recording Method Certifications*, MB Docket Nos. 04-55, *et al.*, FCC 04-193 (rel. Aug. 12, 2004) (the "Certification Order").

controls in protecting digital broadcast television content. The MPAA Parties noted that approval of technologies without proximity controls was premature given (1) that the Commission has yet to resolve the criteria necessary to permit secure remote access to broadcast television programs; and (2) that in the case of TiVoGuard, the record supporting the Commission's decision was inadequate in several respects. The MPAA Parties also observed that even if the Commission were correct in proceeding to authorize technologies without proximity controls where "other reasonable constraints" are demonstrated, TiVoGuard fails meet that standard. Further, TiVo supplied no information concerning how it would prevent evasion of its affinity-based controls after approved proximity-based outputs are used downstream.

None of the various parties filing comments or oppositions have raised a serious challenge to the bases of the MPAA Parties' Petition. No party contests that the Commission has postponed consideration of the criteria for remote access to another proceeding. No party contests that TiVo failed to place certain information concerning its technology in the record. No party denies that the Commission based its approval of TiVoGuard on TiVo's representations concerning the content of its user agreement and on TiVoGuard's alleged ability to prevent "daisy-chaining." No party contends that user agreements are a technological protection measure, or that all indiscriminate redistribution is done through "daisy-chains." Instead, several parties have challenged the conclusions to be drawn from such premises. However, as demonstrated in the MPAA Parties' Petition and reiterated below, the most reasonable conclusion to draw concerning a premature decision based on an inadequate record concerning a technology that fails to meet the Commission's goals is that it must be reconsidered.

Finally, with respect to the Certification Order generally, the MPAA Parties requested that the Commission reconsider its decision to require prior approval of changes where a private

content participant agreements exists with effective change management provisions. Most responses to this request were off-target, incorrectly interpreting the request as one to make such agreements free from Commission oversight entirely. Those that did understand the MPAA Parties' Petition failed to offer any reason for distinguishing between the oversight role the Commission should adopt with respect to change management, and the oversight it exercises over private agreements in most other areas under its jurisdiction. The MPAA Parties' Petition should therefore be granted for the reasons stated therein.

I. The Record Does Not Support Adoption of TiVoGuard or SmartRight Without Proximity Controls

As argued in the MPAA Parties' Petition,³ given the numerous complex technical, policy, and legal questions remaining to be resolved concerning remote access, and the fact that the Commission is now conducting a proceeding that may help resolve some of those questions, it was premature for the Commission to approve remote access technologies in the interim proceeding prior to a determination of the technological protections that may be necessary. TiVo and others argue for the opposite conclusion – that in the absence of defined criteria, the Commission should place no limits on remote access.⁴ However, it is inarguably safer to expand capabilities based on known criteria than to allow a legacy of products to be built in advance of such criteria, in the hope that the variances between the legacy products and the final criteria do not prove to be too significant.

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³ See MPAA Parties' Petition at 2-3. TiVo repeatedly chastises the MPAA Parties for "brazenly" requesting that the Commission reconsider a decision it has already entered. See Opposition of TiVo Inc., MB Docket No. 04-63, at 4, 9, 10, 23 (filed Sept. 27, 2004) ("TiVo Opposition"); see also Opposition of Consumer Groups, MB Docket No. 04-63, at 4 (filed Sept. 27, 2004) ("PK/CU Opposition"). Naturally, such criticisms are misplaced, since the entire purpose of a petition for reconsideration is to request reconsideration of an existing decision. See 47 C.F.R. § 1.106(b)(1).

⁴ See TiVo Opposition at 4.

TiVo's certification for TiVoGuard should have been denied for an additional reason: the technology is not yet well defined. The failure of TiVo to provide adequate specification for its technology is most apparent with respect to its remote access capability, particularly its TiVoToGo implementation, and with respect to how registration in a so-called "Secure Viewing Group" ("SVG") is handled. TiVo readily admits that key components of its technology's remote access capability are "still at the concept stage." The MPAA Parties request not that every technology be "tried and tested" before being submitted for Commission approval, but that technologies be at least well enough defined to permit evaluation of their capabilities and controls. TiVoGuard's certification fails to meet this minimal standard and its approval should therefore be reconsidered.

TiVo also failed to introduce any evidence concerning the content or operation of its subscriber agreement. This lapse is critical because the subscriber agreement was one of the two bases on which the Commission concluded that TiVoGuard contains "other reasonable constraints sufficient[to] limit the redistribution of content." TiVo admits that its subscriber agreement has never been placed in the record. Nor has TiVo ever offered any evidence concerning how it might detect or prevent violations of the agreement.

Among the most troubling lapses in the record is the lack of any detailed description of the process for registration of devices within an SVG. The registration process is crucial to TiVoGuard, because registration determines the persons and places to which content may be redistributed using TiVoGuard. TiVo maintains that it has "fully and accurately disclosed in the

⁵ See TiVo Opposition at 4 & n.7.

⁶ See MPAA Parties' Petition at 5-6.

⁷ Certification Order ¶ 72.

⁸ See TiVo Opposition at 5.

record . . . the process for registering a device." The sources cited for this claim, however, demonstrate nothing of the sort. One states only that customers may register devices "via a password-protected web interface or by calling customer support." The document provides no other information about what restrictions or controls are placed by TiVo on the registration process. A second source mentions registration of devices, but provides no further detail. The third source does not address registration at all. 12

In the absence of any evidence from TiVo concerning registration, and as far as can be otherwise determined from TiVo's filings, TiVoGuard's affinity-based controls lack necessary technological measures to protect digital broadcast television. For example, TiVo claims that it will prevent indiscriminate unauthorized redistribution because "upon learning of and confirming such use" it will "terminate that user's subscription." However, TiVo offers no indication that it has any means of detecting or confirming the source of such abuses. Indeed, TiVo's discussion of registration in its Opposition simply confirms this point. TiVo claims that SVGs "by their nature cannot be formed by arms' length exchanges between 'strangers." The reason, TiVo argues, is that registrants allegedly must subscribe to the TiVo service and "must request that each device he or she owns be added" to the SVG. However, there is nothing in the "nature" of SVGs that ensures that the devices added to an SVG by a person are actually owned by that person. Instead, the only impediment TiVo offers to a user's registration of strangers'

⁹ TiVo Opposition at 6 & n.11.

¹⁰ Broadcast Flag Certification of TiVo Inc., MB Docket No. 04-63, at 25-26 (filed Feb. 27, 2004).

¹¹ See Reply of TiVo Inc., MB Docket No. 04-63, at 20 (filed Apr. 16, 2004).

¹² See Letter from James M. Burger, Counsel to TiVo, to Marlene H. Dortch, Secretary, FCC, MB Docket 04-63, at Attachment (July 28, 2004).

¹³ TiVo Opposition at 7.

¹⁴ TiVo Opposition at 12 (emphasis added.).

devices is that "*TiVo's subscriber agreement* specifically provides that content may only be transferred among devices registered to a single account and used 'within your household.'"¹⁵

TiVo notes that the MPAA has requested that the Commission consider, as part of its review of any technology, non-technological aspects of that technology such as its licensing terms. TiVo is comparing apples and oranges, however. The licensing terms to which it refers are in addition to, not a substitute for, underlying technological protection of digital broadcast television program. As the MPAA Parties stated in their Petition, while a user agreement is admittedly useful and even necessary in enforcing compliance by users with technological protection measures, it is not *itself* a technological protection measure and cannot substitute for one. The interval of the interval o

For all of these reasons, TiVo's certification for TiVoGuard does not provide a sufficient basis on which to approve TiVoGuard for use with Marked Content, and the Commission should reconsider its decision.¹⁸

II. Without Proximity Controls, TiVoGuard and SmartRight Fail to Meet the Commission's Stated Standard for Approval

The MPAA Parties have requested that the Commission postpone approval of any remote access technologies until criteria for remote access are determined. However, even under the Commission's determination that it can proceed now on a case-by-case basis to approve remote

¹⁵ TiVo Opposition at 13 (emphasis added).

¹⁶ See TiVo Opposition at 11.

¹⁷ See MPAA Parties' Petition at 7.

¹⁸ TiVo also claims that the MPAA Parties "intimate[d]" in their Petition that the Commission had found that TiVoGuard lacked appropriate revocation and renewal information, when in fact the Commission concluded the opposite. TiVo Opposition at 15. No such intimation was intended or can reasonably be inferred. The context of the paragraph, in which the MPAA Parties are requesting reconsideration of various Commission conclusions, makes clear both the Commission's position and the MPAA Parties'. *See* MPAA Parties' Petition at 11.

access technologies if they contain "other reasonable constraints [that] sufficiently limit the redistribution of content," TiVoGuard and SmartRight (without proximity controls) fail to meet that standard. TiVoGuard allows indiscriminate redistribution of digital broadcast television content to any person in the world with a one-time exchange of a serial number.¹⁹ SmartRight (without proximity controls) allows indiscriminate redistribution to any other SmartRight device in the world that is part of the sender's self-selected "Personal Private Network" ("PPN").²⁰ Neither TiVo nor SmartRight has any means of technologically limiting or preventing such redistribution, other than to limit redistribution to ten devices per SVG or PPN.

TiVo's response, made repeatedly throughout its Opposition, is that such concerns are "minor" and concern only "unauthorized redistribution," and therefore "hav[e] nothing to do with TiVo's ability to prevent the indiscriminate redistribution of content." In other words, TiVo admits that its system has leaks, but argues that they are not large enough to cause concern. TiVo and its supporters remain steadfastly focused on attempts to use the TiVoGuard technology to redistribute, in a single attempt, content from one person to millions. However, they continue to overlook the cumulative impact of redistribution from every TiVo owner to every other TiVo owner. The result may be equally devastating, and equally "indiscriminate," and nothing TiVo or any other party has submitted to the Commission has demonstrated otherwise. ²²

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¹⁹ TiVo does not contest the MPAA Parties' statement that "the device registration process may consist of nothing more than typing a serial number into a website," MPAA Parties' Petition at 5.

²⁰ Comments of SmartRight, MB Docket No. 04-59, at 3-4 (filed Sept. 23, 2004).

²¹ TiVo Opposition at 6; *see also* PK/CU Opposition at 5. SmartRight, on the other hand, has agreed to incorporate proximity controls in its initial implementation. *See* Letter from David H. Arland, Thomson Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 04-59 (June 23, 2004).

²² TiVo also continues to rely on the claim, one that the Commission has already rejected, that redistribution over the Internet is too inconvenient and time-consuming to be worrisome. *See* TiVo Opposition at 7, 15. TiVo's argument that TiVoGuard's lapses should be excused because other violations of the regulation will be worse is similarly unavailing. *See* TiVo Opposition at 13-14.

TiVo argues that such redistribution is "unlikely."²³ The evidence concerning peer-to-peer trafficking in copyrighted content, however, indicates otherwise. Persons using illegitimate peer-to-peer services are willing to not only take the time to download such programs and install them, and spend considerable time searching for songs, but also to bear the burden of adware programs, spam, pornography, and other malicious content that typically accompanies such programs in order to gain access to infringing material. Other than unsupported speculation, neither TiVo nor any other party has offered any foundation for the claim that substantial harm from the cumulative impact of millions of users redistributing content to multiple additional recipients is "unlikely."

CDT argues that TiVoGuard and SmartRight will allow no more indiscriminate redistribution than proximity-based technologies, which may also "allow users to share content with 'total strangers' in the same apartment building or college dormitory complex." This argument fails to account for the vastly greater reach of technologies using affinity-based controls, and the greater harms caused by such redistribution. Affinity-based technologies can, if not properly restrained, redistribute content not just to persons in a single building, but to anyone worldwide interested in receiving it, with minimal effort. While no protection technology is perfect, proximity controls, by keeping broadcast content within a tightly confined geographic area, do not undermine the local broadcast television system in the way that unconstrained affinity-based technologies can. ²⁵

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²³ TiVo Opposition at 6; *see also* Opposition of the Center for Democracy & Technology, MB Docket Nos. 04-55, *et al.*, at 4 (filed Sept. 28, 2004) ("CDT Opposition"). Public Knowledge and Consumers Union argue, incorrectly, that a physical exchange of dongles would be necessary to redistribute content using TiVoGuard. *See* PK/CU Opposition at 6. However, as the MPAA Parties argued, registration in an SVG evidently requires only the dongle's serial number; no physical exchange is necessary. *See* MPAA Parties' Petition at 5.

²⁴ CDT Opposition at 3.

²⁵ See MPAA Parties' Petition at 11.

III. TiVo Has Not Provided a Solution to the Mixed-Controls Problem

In their Petition for Reconsideration, the MPAA Parties also raised a troubling and unresolved issue with respect to TiVoGuard and other technologies that rely only on affinity-based controls. If such technologies are combined in a singled device with output technologies containing proximity-based controls, the affinity-based controls may be used to defeat the proximity-based controls unless some means of propagating the proximity controls downstream is incorporated into the affinity-based technology. Otherwise, by alternating between types of outputs, affinity controls can be used to evade proximity restrictions and vice versa. TiVo spells out one possible scenario in which this might occur, which involves two unrelated persons in a vacation home, and which TiVo again deems unlikely. But alternative scenarios are possible, such as where the proximity-based control is a wireless connection between neighboring apartments, or where multiple affinity groups are owned by the same person. TiVo has not offered any evidence that its technology is not vulnerable to such exploits.

The solution the MPAA Parties request is not, as TiVo claims, to forbid interoperability, ²⁷ but to request that output protection technology providers of one sort that propose allowing downstream devices to have, as approved outputs, outputs of the other sort, demonstrate how the relevant controls will be enforced downstream. This minimal showing is absolutely essential and should not pose a significant burden for technology providers.

IV. The Commission Should Not Require Preliminary Approval of Changes Where Effective Private Change Management Provisions Exist

Several of the parties filing oppositions entirely misunderstood the nature of the MPAA Parties' request concerning change management. The MPAA Parties requested that the

²⁶ See TiVo Opposition at 17.

²⁷ See TiVo Opposition at 18.

Commission reconsider its decision to require *prior approval* of changes where a private content participation agreement provides effective change management procedures. The MPAA Parties did not request that the Commission exercise *no* oversight role whatsoever over change management in such circumstances.²⁸ The arguments proffered by several parties against the MPAA proposal are therefore largely inapposite. In support of their request, the MPAA Parties cited procedures governing other aspects of the Flag regulation or other regulations in which the Commission exercises oversight only after-the-fact, in the event of a dispute. As the Commission has itself noted, this has the beneficial effect of allowing marketplace agreements and the procedures therein to play out before regulatory oversight is invoked. All the MPAA Parties request is that the same doctrine be applied to private change management provisions in the context of the Broadcast Flag regulation. No party filing in opposition provided any reason why change management of Broadcast Flag technologies should be treated differently.

CONCLUSION

For the reasons stated above, the certifications approved by the Commission should be reconsidered in part and clarified to require proximity controls in TiVoGuard and SmartRight, respectively; the Commission should clarify that mixed networks comprised of both affinity-based and proximity-based technologies must contain adequate controls; and the Commission should reconsider its decision to require prior approval of material changes where effective change management procedures are provided in a private content participant agreement.

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²⁸ Compare MPAA Parties' Petition at 13 with TiVo Opposition at 19-22; CDT Opposition at 4; Comments of Philips Electronics North America Corp., MB Docket Nos. 04-55, et al., at 3-4 (filed Sept. 23, 2004); PK/CU Opposition at 7.

Respectfully submitted,

THE MOTION PICTURE ASSOCIATION OF AMERICA, INC. METRO-GOLDWYN-MAYER STUDIOS INC. PARAMOUNT PICTURES CORPORATION SONY PICTURES ENTERTAINMENT INC. TWENTIETH CENTURY FOX FILM CORPORATION UNIVERSAL CITY STUDIOS LLLP THE WALT DISNEY COMPANY WARNER BROS. ENTERTAINMENT INC.

Jon A. Baumgarten

Bruce E. Boyden Proskauer Rose LLP

1233 Twentieth Street NW, Suite 800

Washington, DC 20036

(202) 416-6800

Counsel for the Petitioners

CERTIFICATE OF SERVICE

I, Bruce E. Boyden, hereby certify that a true and correct copy of the Reply of the Motion Picture Association of America, Inc., *et al.*, was served on the following parties on October 5, 2004, by electronic mail:

Jonathan L. Rubin, P.A. 1717 K Street NW, Suite 600 Washington, DC 20036 JRubin@antitrustinstitute.org Counsel for American Antitrust Institute

Christopher Murray Consumers Union 1666 Connecticut Ave. NW Washington, DC 20009 murrch@consumer.org

Seth D. Greenstein
McDermott, Will & Emery
600 Thirteenth St. NW
Washington, DC 20005-3096
sgreenstein@mwe.com
Counsel for Digital Transmission Licensing
Administrator LLC

Bruce H. Turnbull
Weil, Gotshal & Manges LLP
1501 K Street NW, Suite 100
Washington, DC 20005
bruce.turnbull@weil.com
Counsel for 4C Entity LLC, Digital Content
Protection LLC, and Victor Co. of Japan
Ltd.

Henry Goldberg Goldberg, Godies, Wiener & Wright 1229 Nineteenth St. NW Washington, DC 20036 HGoldberg@G2W2.com Counsel for Hewlett-Packard Company Gerard J. Waldron
Mary Newcomer Williams
Covington & Burling
1201 Pennsylvania Ave. NW
Washington, DC 20004-2401
gwaldron@cov.com
mwilliams@cov.com
Counsel for Microsoft Corp.

Kurt A. Wimmer Covington & Burling 1201 Pennsylvania Avenue NW Washington, DC 20004-2401 kwimmer@cov.com Counsel for National Football League

Lawrence R. Sidman
Sara W. Morris
Paul, Hastings, Janofsky & Walker LLP
1299 Pennsylvania Ave. NW, 10th Fl.
Washington, DC 20004
lawrencesidman@paulhastings.com
saramorris@paulhastings.com
Counsel for Philips Electronics North
America Corp. and Thomson Inc.

Nathan Mitchler
Mike Godwin
Public Knowledge
1875 Connecticut Ave. NW, Suite 650
Washington, DC 20009
nmitchler@publicknowledge.org
mnemonic@well.com

Laura H. Phillips Drinker, Biddle & Reath LLP 1500 K Street NW, Suite 1100 Washington, DC 20005-1209 lphillips@dbr.com Counsel for RealNetworks, Inc.

James M. Burger
Briana E. Thibeau
Dow, Lohnes & Albertson PLLC
1200 New Hampshire Ave. NW, Suite 800
Washington, DC 20036-6802
jburger@dowlohnes.com
bthibeau@dowlohnes.com
Counsel for TiVo Inc.

Jennifer Coplan
Debevoise & Plimpton
919 Third Avenue
New York, NY 10022
Jennifer.Coplan@debevoise.com
Counsel for Sony Corp.

Borce E. Boyden